S T A T E O F M I C H I G A N

C O U R T O F A P P E A L S

CONNIE RUSSELL, Plaintiff-Appellee,	UNPUBLISHED May 23, 2006
v	No. 263903 Wayne Circuit Court
PBG MICHIGAN, L.L.C., Defendant-Appellant.	LC No. 04-427528-CZ

Before: Cooper, P.J., and Jansen and Markey, JJ.

COOPER, P.J. (*dissenting*).

Defendant appeals by leave granted from an order denying its motion for summary disposition in this action alleging racial and sexual harassment, racial discrimination and gender discrimination.[1] The majority finds the lower court erred, but I must respectfully dissent because I do not believe that a claim for an ongoing hostile work environment should be subject to the same "time of the wrong" analysis as a claim for discrimination stemming from a specific event.

Defendant argues and the majority agrees that the trial court erred when it allowed the plaintiff to proceed with her claim of a racially hostile work environment, arguing the complaint for a violation of CRA must be brought within three years, as provided by MCL 600.5805(1) and

1 Plaintiff alleged that she was subjected to a racially hostile work environment throughout her employment at defendant's Detroit facility. At her deposition, plaintiff testified that between 1992 and 2001, specific racially inappropriate incidents and a general overtone of racial tension contributed to a hostile work environment. The specific incidents alleged included comments about the KKK, use of racial epithets in written messages left in the work area, prank telephone calls to her home, nails in her car tires in the parking area, scratches to her car, and a noose in the production area. Plaintiff's co-workers corroborate her sense of the general atmosphere of racial tension; news reports corroborate specific events such as the noose hung in the work area. When the noose was found, plaintiff broke down and cried, and less than four months later went on disability because of medical problems associated with the stress that she endured in the hostile environment. She was admitted to a psychiatric hospital shortly after her last day of active employment and was declared mentally disabled by the Social Security Administration.

(10). *Garg, supra*, 472 Mich at 266, 272; *Magee, supra*, 472 Mich at 113. MCL 600.5801(1) provides:

> A person shall not bring or maintain an action to recover damages for injuries to persons or property unless, after the claim first accrued to the plaintiff or to someone through whom the plaintiff claims, the action is commenced within the periods of time prescribed by this section.

The general three-year limitations period under MCL 600.5805(10) applies to CRA actions. *Garg, supra* at 266, 272; *Magee, supra* at 113. MCL 600.5827 states that a claim accrues "at the time the wrong upon which the claim is based was done regardless of the time when the damage results." Defendant argues that the trial court erroneously denied its motion for summary disposition because plaintiff suffered no discriminatory action within three years before she filed her complaint.

I disagree because I believe that a claim of hostile work environment creates a cause of action against an employer for the work environment, not against specific individuals for discrete acts of discrimination or harassment. The environment that allows persons predisposed to racist acts to actually act on those impulses is itself the cause of action. On these facts, for example, the noose event is a product of the overall environment of racial tension and if not overt acceptance of racist attitudes, at least a failure to address them on the part of the employer, here defendant Pepsi. At the same time, the noose event is a trigger for ongoing hostility, and defendant's response to it and the ensuing media circus accelerated rather than dissipated the hostile environment. Specific events therefore cannot define the appropriate time frame for accrual of this cause of action, because it was the surrounding circumstances, rather than any event, that gave rise to the cause of action. The climate after each event, where little or nothing was done to immediately address the problem, both encouraged future similar behavior from the perpetrators and reaffirmed the hostility of the work environment for the victims. This vicious cycle is the harm that plaintiff alleges, and for which defendant must respond.[2]

In her complaint, plaintiff alleged a hostile work environment claim based on her race. This Court has previously recognized that conduct or communication regarding a protected classification that creates a hostile work environment is actionable. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 626-627; 576 NW2d 712 (1998).

> In order to establish a prima facie case of hostile work environment, a plaintiff must prove: (1) the employee belonged to a protected group; (2) the employee was subjected to communication or conduct on the basis of the protected status; (3) the employee was subjected to unwelcome conduct or communication on the basis of the protected status; (4) the unwelcome conduct or

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[2] Plaintiff was not the only employee to feel the atmosphere was racially hostile. Defendant's production manager, Ehssan Jedeon, stated in his deposition regarding the ongoing mistreatment of African-Americans by Caucasian co-workers: "As I worked in that facility there was that tension always there, feeling of tension. You can just feel it."

> communication was intended to, or in fact did, interfere substantially with the employee's employment or created an intimidating, hostile, or offensive work environment; and (5) respondeat superior. [*Id*. at 629 (citations omitted).]

In an action alleging racial harassment under Michigan's Elliot-Larson Civil Rights Act (CRA), the Court must consider the totality of circumstances to determine whether unwelcome conduct created a hostile work environment. *Quinto v Cross & Peters Co*, 451 Mich 358, 368-369; 547 NW2d 314 (1996), quoting *Radtke v Everett*, 442 Mich 368, 382-383; 501 NW2d 155 (1993) (alteration in original). The standard is whether a reasonable person in the plaintiff's position would have perceived the conduct as creating a hostile environment. *Id.* The totality of the circumstances include the frequency of the discriminatory conduct, its severity, whether it is physically threatening or humiliating or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance. *Id.* See also *Chambers v Trettco Inc*, 463 Mich 297, 319; 614 NW2d 910 (2000).

The environment is hostile when it allows events to occur repeatedly over time such that an employee's work is interfered with, not simply when any single event disrupts the workplace. The environment is hostile because the employer's response to the events is insufficient to stop them from recurring. An employee has a right to a work environment free from racial hostility and intimidation, and when an employer cannot provide it, I would find that a cause of action accrues based on the period of employment, not on the specific dates of particular manifestations of hostility.

Defendant argues *Magee* and *Garg* require specific discriminatory conduct within three years of the filing of a claim. Plaintiff concedes that the *Garg* decision bars claims based on discrete actions of racial discrimination which occurred beyond the three-year statute of limitations period, but argues *Magee* allows that a hostile work environment claim accrues on the last day of active employment.

In *Magee, supra* at 109-110, the plaintiff, an employee of the defendant DaimlerChrysler Corporation, went on medical leave on September 12, 1998, and without returning to work resigned her employment on February 2, 1999. She filed an action under the CRA on February 1, 2002, alleging that "she had been unlawfully discriminated against and harassed during most of her twenty-two years at DaimlerChrysler." *Id*. at 110. In her complaint, she alleged that the harassment continued until September 12, 1998, her last day of active employment. *Id.* The trial court granted DaimlerChrysler's motion for summary disposition based on the statute of limitations. *Id.* at 110-111. On appeal, this Court relied on *Collins v Comerica Bank*, 468 Mich 628; 664 NW2d 713, reh den 469 Mich 1223 (2003), and reversed the trial court's ruling, holding that the plaintiff's claims were timely because they were filed within three years after the date of the plaintiff's resignation. *Id.* at 111. The Supreme Court, however, held that this Court's reliance on *Collins* was misplaced given that the plaintiff did not allege discriminatory termination as the plaintiff in *Collins* had alleged. Rather, the Supreme Court noted that the plaintiff's claims were based on alleged discriminatory conduct that occurred before her leave of absence. *Id.* at 112. The Supreme Court stated:

> To determine whether Magee's claims were timely filed, we look to MCL 600.5805(10), which establishes that the applicable period of limitations is three years from the date of injury. Because Magee alleged no discriminatory conduct

> occurring after September 12, 1998, the period of limitations on Magee's claims expired, at the latest, three years from that date, or by September 12, 2001. Accordingly, as the trial court held, Magee's February 1, 2002, complaint was not timely filed. [*Id*. at 113.]

In *Magee*, the claim alleging a hostile work environment could have accrued on the employee's last day of active employment, but not on the date of her resignation. Following this analysis, the hostile work environment itself may be sufficient discriminatory conduct to support a claim. The Court found only that the plaintiff in *Magee* could not support her allegation of discrimination beyond her last day of active employment.

The Supreme Court reaffirmed the *Magee* holding in *Garg, supra*, 472 Mich at 284-285. In that case, the plaintiff filed suit alleging discrimination and retaliation. The defendant moved for partial summary disposition, arguing that some of the plaintiff's allegations were barred by the three-year limitations period under MCL 600.5805(1) and (10). The trial court denied the motion on the basis of the continuing violations doctrine of *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505; 398 NW2d 368 (1986), overruled in *Garg, supra* at 284.[3] *Id*. at 270. On appeal, the Court stated:

> MCL 600.5827 provides that a "claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." Thus, §5805 requires a plaintiff to commence an action within three years of each adverse employment act by a defendant. Section 5805 does not say that a claim outside this three-year period can be revived if it is somehow "sufficiently related" to injuries occurring within the limitations period. Rather, the statute simply states that a plaintiff "shall not" bring a claim for injuries outside the limitations period. Nothing in these provisions permits a plaintiff to recover for injuries outside the limitations period when they are susceptible to being characterized as "continuing violations." To allow recovery for such claims is simply to extend the limitations period beyond that which was expressly established by the Legislature. [*Id*. at 282 (footnote omitted).]

Accordingly, the Court overruled *Sumner* and held that an action under the CRA must be filed within three years of the date that the cause of action accrued. *Id*. at 284.

In this case, plaintiff is not alleging continuing violations, but rather that the hostile work environment was itself a violation of her civil rights. In this light, specific events such as the noose event are triggering events that fuel the hostile work environment, not isolated or isolatable incidents the effects of which may be measured in a vacuum. The aftermath of each

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[3] The continuing violations doctrine allowed recovery for incidents occurring outside the applicable three-year limitations period "where an employee challenges a series of allegedly discriminatory acts so sufficiently related as to constitute a pattern where only one of the acts occurred within the limitation period." *Meek v Michigan Bell Tel Co*, 193 Mich App 340, 344; 483 NW2d 407 (1992).

such event, including the employer's response to it or lack thereof, is as much a part of the environment as each triggering event itself. That such events may happen and happen repeatedly evidences the ongoing nature of the racial tension in the workplace. As such, the hostile environment is one violation from the first day that a reasonable person in plaintiff's position, given the totality of the circumstances, would have felt the work environment was hostile or intimidating to the last day, which is this case was the last day of active employment.

The discrete hostile acts in this case, including events so overtly racial as the display of a noose in the workplace, exemplify the work environment. The employer's response to such events defines the work environment. On these facts, daily interaction with the perpetrators of such conscience-shocking behavior may itself be event enough for a reasonable person to find his or her employment substantially interfered with, the very definition of a hostile work environment. The testimony of Mr. Jedeon indicates that there was a racial tension that always existed in defendant's plant. Plaintiff testified that the racially hostile work environment which she was subject to continued until her on-the-job mental breakdown which occurred on her last day of active employment. Taking the testimony in the light most favorable to the nonmoving party, the cause of action arose on the last day of her employment. Plaintiff's last day of active employment was September 14, 2001. Thus, the last day plaintiff was subjected to this hostile work environment was September 14, 2001. Plaintiff filed her complaint within three years of September 14, 2001; the trial court therefore correctly found the claim was timely filed.

I would affirm.

/s/ Jessica R. Cooper